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12
13 **UNITED STATES DISTRICT COURT**

14 **CENTRAL DISTRICT OF CALIFORNIA**

15 DR. ALLEN PANZER, AMY
16 SAYERS, LILY JEUNG, and
DARREN WALCHESKY, on behalf
17 of themselves and all others similarly
18 situated,

19 Plaintiffs,

20 v.

21 YELP INC.,

22 Defendant.

CASE NO. CV13-07805-DDP-JCG

Assigned Judge: Hon. Dean D. Pregerson

**DEFENDANT YELP INC.'S
MOTION TO DISMISS FIRST
CAUSE OF ACTION FOR
VIOLATION OF THE FLSA
(F.R.C.P. 12(B)(6)), AND TO STRIKE
CLASS ACTION ALLEGATIONS
(F.R.C.P. 12(F)); MEMORANDUM
OF POINTS AND AUTHORITIES**

*[FILED CONCURRENTLY WITH:
DECLARATION OF ANGELI ARAGON;
REQUEST FOR JUDICIAL NOTICE]*

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

With the rise of the Internet as a tool for expression and commerce, websites have proliferated to give hundreds of millions of people ways to express themselves in unprecedented ways. Online users can spread news on Twitter, post job listings on Craigslist, review books on Amazon, or share consumer experiences on Yelp—reaching a far more vast audience for their content than ever before. Plaintiffs here threaten to upend these innovative services with the outrageous claim that anyone who posts something on the Internet becomes an employee of the online forum in which it is posted, and is therefore entitled to compensation under the Fair Labor Standards Act. These are meritless allegations, but if legitimized by this Court would endanger the public’s access to free online forums.

Defendant Yelp Inc. (“Yelp”) is a leading online forum that allows members of the public, free of charge, to read and write reviews about their experiences with local businesses, government services, and other local establishments. The named Plaintiffs (Dr. Allen Panzer, Amy Sayers, Lily Jeung and Darren Walchesky (collectively “Plaintiffs”)) are people who have used Yelp’s free websites to post content, and therefore now claim that they are employees of Yelp.

Plaintiffs, however, have never been employees of Yelp, and the Complaint’s meandering allegations fail to establish the existence of any employer/employee relationship between Plaintiffs and Yelp under the Fair Labor Standards Act (“FLSA”). Accordingly, pursuant to Rule 12(b)(6), this Court should dismiss Plaintiffs’ First Cause of Action claiming a violation of the FLSA.

In addition, pursuant to Rule 12(f), Plaintiffs’ purported class action allegations should be stricken because Plaintiffs identify no ascertainable class in their Complaint.

Finally, the Court should not give Plaintiffs the opportunity to amend their Complaint, as it is clear that they cannot save their faulty pleading of an

1 employer/employee relationship, or of an ascertainable class, through amendment.
 2 *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir.
 3 2005) (A court need not permit amendment if “it is clear that the complaint could
 4 not be saved by an amendment.”)

5 **II. PLAINTIFFS’ ALLEGATIONS IN THEIR COMPLAINT**

6 **A. Yelp**

7 Yelp publishes popular websites (such as www.yelp.com) that allow
 8 consumers—like Plaintiffs—to freely read and write reviews about local
 9 businesses, government services, and other local establishments online. Complaint,
 10 par. 1 (calling online reviews a “popular and valuable resource for consumers”). As
 11 Plaintiffs admit, the reviews on Yelp’s website are contributed by members of the
 12 public (like themselves), who rate local businesses on a scale of one to five stars.
 13 Complaint, pars. 2, 3. As the Complaint notes, Yelp averages over 100 million
 14 unique visitors per month to its websites, and its users have contributed over 40
 15 million reviews. Complaint, par. 2.

16 **B. Yelp’s Terms of Service and Other Written Policies**

17 Like other websites, Yelp maintains Terms of Service, Content Guidelines,
 18 Frequently Asked Questions and other policy statements that set limits on how
 19 individuals may use Yelp’s services. Complaint, pars. 48, 49. *See* Yelp’s
 20 Frequently Asked Questions, Declaration of Angeli Aragon (“Aragon Decl.”), par.
 21 3, Ex. A; Terms of Service, Aragon Decl., par. 4, Ex. B; Content Guidelines,
 22 Aragon Decl., par. 5, Ex. C; Elite Squad Terms of Membership (“Elite Terms”),
 23 Aragon Decl., par. 6, Ex. D. Yelp’s Terms of Service and Content Guidelines
 24 (together “Terms”), for example, govern use of Yelp’s services. Complaint, par.
 25 49. *See* Aragon Decl., Terms of Service, Aragon Decl., par. 4, Ex. B; Content
 26 Guidelines, Aragon Decl., par. 5, Ex. C.

27 The Terms, for example, make clear that a Yelp user retains ownership of the
 28 content that he or she submits to Yelp, and that certain conduct—such as posting

1 reviews that are paid for—is prohibited. Terms of Service, Aragon Decl., par. 4,
 2 Ex. B, Sections 5(A), 5(C), 12(A);¹ Content Guidelines, Aragon Decl., par. 5, Ex.
 3 C, “General Guidelines” and “Review Guidelines.” *See also* Frequently Asked
 4 Questions, Aragon Decl., par. 3, Ex. A, “User Reviews.” The Terms of Service
 5 state that Yelp may terminate user accounts at any time, and allow users to

6
 7 ¹ 5. CONTENT

8 A. Responsibility for Your Content

9 You alone are responsible for Your Content, and once published, it cannot
 10 always be withdrawn. You assume all risks associated with Your Content,
 11 including anyone’s reliance on its quality, accuracy, or reliability, or any
 12 disclosure by you of information in Your Content that makes you personally
 identifiable. You represent that you own, or have the necessary permissions
 to use and authorize the use of Your Content as described herein. You may
 not imply that Your Content is in any way sponsored or endorsed by Yelp.

13 * * *

14 C. Ownership

As between you and Yelp, you own Your Content.

15 * * *

16 F. Other

17 User Content (including any that may have been created by users employed
 18 or contracted by Yelp) does not necessarily reflect the opinion of Yelp. We
 19 reserve the right to remove, screen, edit or reinstate User Content from time
 to time at our sole discretion for any reason or no reason, and without notice
 to you. For example, we may remove a review if we believe it violates our
 Content Guidelines.

20 * * *

21 12. ... BY ACCESSING OR USING THE SITE, YOU REPRESENT
 22 THAT YOU HAVE READ, UNDERSTOOD, AND AGREE TO THESE
 TERMS, INCLUDING THIS SECTION.

23 A. THE SITE IS MADE AVAILABLE TO YOU ON AN “AS IS”,
 24 “WITH ALL FAULTS” AND “AS AVAILABLE” BASIS, WITH THE
 25 EXPRESS UNDERSTANDING THAT THE YELP ENTITIES MAY NOT
 26 MONITOR, CONTROL OR VET USER CONTENT. AS SUCH, YOUR
 27 USE OF THE SITE IS AT YOUR OWN DISCRETION AND RISK. THE
 28 YELP ENTITIES MAKE NO CLAIMS OR PROMISES ABOUT THE
 QUALITY, ACCURACY, OR RELIABILITY OF THE SITE, ITS SAFETY
 OR SECURITY, OR THE SITE CONTENT.

1 terminate their own accounts. Terms of Service, Aragon Decl., par. 4, Ex. B.,
 2 Section 14(A) and (B).² See also Elite Terms, Aragon Decl., par. 6, Ex. D, Section
 3 5.³ The Content Guidelines also clarify that content submitted by users should be
 4 relevant and appropriate for the forum—for example, noting that business reviews
 5 should reflect a personal experience as opposed to relating the experience of
 6 another, or that photos on a business listing should reflect a consumer experience
 7 and not, for example, one’s personal photo of friends or family (such photos,
 8 however, are permitted on Yelp user profiles as opposed to business listings).
 9 Content Guidelines, Aragon Decl., par. 5, Ex. C; see also Frequently Asked
 10 Questions, Aragon Decl., par. 3, Ex. A, “User Reviews.”

11 C. Yelp Elite Squad

12 Yelp invites certain users to join the Elite squad, a program through which
 13 Yelp recognizes certain users that frequently contribute quality content to Yelp’s
 14 websites. See Complaint, pars. 39-40, 53-54. Users that accept Yelp’s invitation
 15 receive access to special events that may include food and beverage tastings from
 16 local businesses, and free promotional items with Yelp branding (i.e., schwag or

17 2 14. TERMINATION

18 A. You may terminate the Terms at any time by closing your
 19 account, discontinuing your use of the Site, and providing Yelp with a notice
 of termination here. ...

20 B. We may close our account, suspend your ability to use certain
 21 portions of the Site, and/or ban you altogether from the Site for any or no
 22 reason, and without notice or liability of any kind. Any such action could
 23 prevent you from accessing your account, the Site, Your Content, Site
 Content, or any other related information.

24 3 5. Termination

25 While we hope not to, Yelp may prohibit your attendance at any Yelp Event
 26 and/or terminate your Elite Squad membership at any time if you fail to abide
 27 by these Elite Terms, the Terms of Service, or for any or no reason, without
 28 notice or liability of any kind. You may terminate your Elite Squad
 membership and these Elite Terms at any time by sending a request to
 feedback@yelp.com.

1 freebies). *Id.* In order to join the Yelp Elite, a user must agree to Yelp's Elite
 2 Terms. The Elite Terms make clear that Yelp Elite members are not employees of
 3 Yelp, and that such members, or Yelp, may terminate Elite membership at any time.
 4 Elite Terms, Aragon Decl., par. 6, Ex. D, Sections 5 and 7.⁴

5 **D. Plaintiffs**

6 Plaintiffs each assert sparse allegations about their individual circumstances.
 7 Plaintiff Dr. Panzer alleges that he is domiciled in Houston, Texas, and has written
 8 approximately 70 Yelp reviews since November 2007. Complaint, par. 15.
 9 Plaintiff Sayers alleges that she is domiciled in Portland, Oregon, that she has
 10 written over 500 reviews for Yelp since 2006, and that she was a Yelp Elite
 11 although Yelp later closed her user account. Complaint, par. 16. Plaintiff Jeung,
 12 who was also a Yelp Elite, and whose user account was also closed, alleges that she
 13 is domiciled in Los Angeles, California, and has written approximately 1,100
 14 reviews. Complaint, par. 17. Plaintiff Walchesky alleges that he is domiciled in
 15 Pittsburgh, Pennsylvania, and has written over 1,200 reviews, as well as 238
 16 follow-up and updated reviews, and has taken and submitted 2,122 photographs.
 17 Complaint, par. 18.

18 **E. Plaintiffs' Purported Class**

19 Plaintiffs plead their class action allegation as follows:

20
 21 Plaintiffs in all claims, pursuant to the FLSA, 29 U.S.C. §216, on
 22 behalf of themselves and all similarly situated persons, were
 23 employees of Defendant, and were not paid wages for their work

24
 25 ⁴ 7. General Terms
 26 You understand that you are not an employee, representative, or agent of
 27 Yelp. You agree that you will not represent yourself as an employee,
 28 representative, or agent of Yelp. We reserve the right to modify, update, or
 discontinue the Elite Squad at our sole discretion, at any time, for any or no
 reason, and without notice or liability.

published on Defendant's website; each performed duties relating to the creation and promotion of content on behalf of Defendant, including but not limited to writing researching, editing, lodging reviews, upgrading prior reviews, and generally promoting the site, during the period between four years prior to the filing of this Complaint and until the date of final adjudication of this action (the "FLSA Class").

Complaint, par. 22.

F. Materials Incorporated By Reference and Necessarily Relied Upon by Plaintiffs in Their Complaint

In their Complaint, Plaintiffs repeatedly reference and rely upon specific Terms and other disclosures displayed on Yelp's website to support their allegations. Complaint pars. 20 ("in conjunction with its detailed policies and procedures and terms and conditions, Defendant controls the behavior of its workers and the placement and content of the their work product"); 40 ("Defendant describes its 'Elite Squad' as a way of "recognizing and rewarding Yelpers who are active evangelists and role models, both on and off the site"); 48 ("By imposing strict guidelines and policies on its reviewers, Defendant exercises full control over the quality, tone, content, quantity, placement, and it's all-important star-rating system."); 49 ("Plaintiffs . . . had to closely adhere to Defendant's contracts, content guidelines, terms of service, and other policy statements"); 51 ("Defendant directly and through its 'Community Managers' controls the writers with ethical standards, often by deleting "non-conforming" work; by chastising its writers for failing to follow Yelp rules; and dispensing so-called "guidelines" in form of directives); and 60 ("Defendant retains pervasive control over the operation and content of its website.").

Given these allegations, this Court may now consider the complete contents of those referenced documents, guidelines, terms and disclosures, when assessing

1 Plaintiffs' allegations with respect to this Motion.⁵ Specifically, such documents
 2 and disclosures include Yelp's Frequently Asked Questions, Terms of Service,
 3 Content Guidelines, and Elite Squad Terms of Membership.

4 **III. THE COURT SHOULD DISMISS PLAINTIFFS' FIRST CAUSE**
 5 **OF ACTION FOR VIOLATION OF THE FLSA**

6 **A. Rule 12(b)(6) Standard**

7 A Rule 12(b)(6) dismissal is proper where there is either a "lack of a
 8 cognizable legal theory" or "the absence of sufficient facts alleged under a
 9 cognizable legal theory." *Balisteri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th
 10 Cir. 1990). A Rule 12(b)(6) motion "rests the legal sufficiency of a claim."
 11 *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

12 A court is not required "to accept as true allegations that are merely
 13 conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re*
 14 *Gilead Sciences Securities Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008). A court
 15 "need not assume the truth of legal conclusions cast in the form of factual
 16 allegation" (*U.S. ex rel Chunie v. Ringrose*, 788 F.2d 638, 643 (9th Cir. 1986).

17 A "plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief'
 18 requires more than labels and conclusions, and a formulaic recitation of the
 19 elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S.
 20 554, 555 (2007). Moreover, a court "will dismiss any claim that, even when
 21 construed in the light most favorable to plaintiff, fails to plead sufficiently all
 22 required elements of a cause of action." *Student Loan Marketing Ass'n v. Hanes*,

23 ⁵ A "court may consider evidence on which the complaint 'necessarily relies,
 24 if: (1) the complaint refers to the document; (2) the document is central to the
 25 plaintiff's claim; and (3) no party questions the authenticity of the copy attached to
 26 the 12(b)(6) motion." *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006). *See*
 27 *also United States v. Corinthian Colleges*, 655 F.3d 984, 999 (9th Cir. 2011). A
 28 court may treat such a document as "part of the complaint, and thus may assume
 that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6)." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

1 181 F.R.D. 629, 634 (S.D. Cal. 1998). “In sum, for a complaint to survive
 2 [dismissal], the non-conclusory ‘factual content,’ and reasonable inferences from
 3 that content, must be plausibly suggestive of a claim entitling the plaintiff to relief.”
 4 *Moss v. U.S. Secret Service*, 572 F.3d 962, 989 (9th Cir. 2009) (quoting *Ashcroft v.*
 5 *Iqbal* (2009) 556 U.S. 662, 678).

6 **B. Plaintiffs Fail To State a Claim Under the FLSA Because They**
 7 **Fail To Plausibly Establish That They Are Employees of Yelp**

8 Plaintiffs are not and never have been Yelp employees. Section 3(e) of the
 9 FLSA, 29 U.S.C. §203(e), defines “employee” “as any individual employed by an
 10 employer.” Under Section 3(d) of the FLSA, an “employer” includes “any person
 11 acting directly or indirectly in the interest of an employer in relation to an
 12 employee.” 29 U.S.C. § 203(d). The determination of whether an
 13 employer/employee relationship exists does not depend on “isolated factors but
 14 rather upon the circumstances of the whole activity.” *Rutherford Food Corp. v.*
 15 *McComb*, 331 U.S. 722, 730 (1947). The “touchstone” is the “economic reality” of
 16 the parties’ relationship. *Bonnette v. California Health & Welfare Agency*, 704
 17 F.2d 1465, 1469 (9th Cir. 1983); *Boucher v. Shaw*, 572 F.3d 1087, 1091 (9th Cir.
 18 2009) (citing *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28, 33
 19 (1961)). To determine whether an employer/employee relationship exists under the
 20 FLSA, the Ninth Circuit applies a four-factor “economic reality” test that considers:
 21 Whether the alleged employer (1) had the power to hire and fire the employees, (2)
 22 supervised and controlled employee work schedules or conditions of employment,
 23 (3) determined the rate and method of payment, and (4) maintained employment
 24 records. See *Lambert v. Ackerley*, 180 F.3d 997, 1001-02, 1012 (9th Cir. 1999);
 25 *Bonnette*, 704 F.2d at 1470.

26 Guided by the above principles, Plaintiffs’ allegations are insufficient to
 27 establish the existence of any employer/employee relationship between Plaintiffs
 28

1 and Yelp under the FLSA.⁶

2 **1. Yelp Has No Power to Hire or Fire**

3 The Complaint is devoid of plausible allegations that Yelp has the ability to
4 hire or fire the Plaintiffs and, indeed, it never hired or fired any of them. This is
5 unsurprising given that each Plaintiff's sole relationship with Yelp is as a user of
6 Yelp's website. Consistent with that fact, Plaintiffs only allege that at different
7 points in time, each Plaintiff began using Yelp's free website to share reviews and
8 photos, and make connections with other users. Complaint, pars. 15-18.

9 Plaintiffs' Complaint never asserts that any Plaintiff was ever hired by Yelp,
10 and identifies no employment contracts, hiring process, or any other information
11 indicative of the commencement of an employment relationship with Yelp or any
12 other understanding that Yelp would pay them for their use of Yelp's free website.

13 Indeed, the only agreements referenced in the Complaint are Yelp's Terms of
14 Service and related policy and guideline documents that govern user of its websites
15 and directly contradict Plaintiffs' claim of employment. *See* Terms, Aragon Decl.,
16 par. 4, Ex. B., Section 12 ("THE SITE IS MADE AVAILABLE TO YOU ON AN
17 "AS IS", "WITH ALL FAULTS" AND "AS AVAILABLE" BASIS, WITH THE
18 EXPRESS UNDERSTANDING THAT THE YELP ENTITIES MAY NOT
19 MONITOR, CONTROL OR VET USER CONTENT. AS SUCH, YOUR USE OF
20 THE SITE IS AT YOUR OWN DISCRETION AND RISK."); Elite Terms, Aragon
21 Decl., par. 6, Ex. D, Section 7 ("You understand that you are not an employee,
22 representative, or agent of Yelp. You agree that you will not represent yourself as

23
24 ⁶ In their Complaint, Plaintiffs rely on the "relative nature of the business" test
25 to support their claim that they are employees of Yelp. While Plaintiffs would fail
26 this test as well, Plaintiffs' reliance is misplaced because this is the wrong test.
27 Specifically, the "relative nature of the business" is one of six factors identified by
28 courts as useful in distinguishing an "employee" from an "independent contractor"
for purposes of FLSA. *See Donovan v. Sureway Cleaners*, 656 F.2d 1368, 1370
(9th Cir. 1981); *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 754 (9th
Cir. 1979). These tests are inapplicable because Yelp has never identified Plaintiffs
as "independent contractors" (nor has this been alleged), and Plaintiffs are neither
independent contractors nor employees of Yelp.

1 an employee, representative, or agent of Yelp.”). These user agreements—coupled
 2 with the lack of any allegations concerning an express or implied employment
 3 agreement—make clear that no plausible employment relationship between
 4 Plaintiffs and Yelp exists. *See Williams v. Strickland*, 87 F.3d 1064, 1067 (9th Cir.
 5 1996) (“Williams had neither an express nor an implied agreement for
 6 compensation with the Salvation Army and thus was not an employee.”); *Tasini v.*
 7 *AOL, Inc.*, 851 F. Supp. 2d 734, 739-741 (S.D.N.Y. 2012) (dismissing state law
 8 equitable claims of “unpaid content providers” because “plaintiffs submitted their
 9 materials to The Huffington Post with no expectation of monetary compensation
 10 and that they got what they paid for — exposure in The Huffington Post”), *aff’d*,
 11 505 Fed. Appx. 45 (2d.Cir. 2012).

12 Further, the Complaint’s reference to Yelp’s closures of the user accounts of
 13 Plaintiffs Sayers and Jeung—contrary to the implausible allegation that this
 14 constitutes “firing”—is not related to any termination of employment. Instead,
 15 Plaintiffs Sayers and Jeung describe only the termination of their free user accounts
 16 for violation of Yelp’s Terms. Complaint, pars. 16, 17 (stating for each that “[h]er
 17 licence to write reviews . . . [was] revoked; the awards she had attained were taken
 18 away; and her reviews were removed from the website, and she has been refused
 19 access to her own writings”); 46 (“their badges and licenses were revoked; their
 20 status and reputation sanctimoniously stripped away; and their extensive work
 21 product deleted from the system with no recourse or ability to recover it”); 47 (“Not
 22 only was my review removed, but I also received an e-mail cancelling my Yelp
 23 account and stating that I could no longer write reviews or get access to any that I
 24 had written. I was fired by Yelp for supposedly breaking one of their rules, which I
 25 didn’t.”).

26 Of course, despite the Complaint’s imaginative conclusion equating “an e-
 27 mail cancelling [a] Yelp account” with being “fired,” such account closures are
 28 entirely consistent Plaintiffs’ status as users of Yelp, rather than employees, and are

disclosed in the Terms of Service repeatedly referenced in the Complaint. Terms of Service, Aragon Decl., par. 4, Ex. B, Section 14; Elite Terms, Aragon Decl., par. 6, Ex. D, Section 5.

Plaintiffs' failure to allege any plausible facts showing that Yelp has the ability to hire or fire them, much less facts showing any employment agreement—implicit or explicit— supports the economic reality that Plaintiffs' are not Yelp's employees under the FLSA. *Strickland*, 87 F.3d at 1067.

2. Yelp Lacks Supervision and Control of Plaintiffs' Work Schedules or Conditions

Plaintiffs fail to allege that Yelp has, or ever had, any control over the Plaintiffs' work schedules, working conditions, equipment or any other component of a legitimate employment relationship. Instead, Plaintiffs make:

- a. blanket allegations that Yelp controls its own "employees" (Complaint pars. 4, 9, 20, 44);
- b. allegations that Yelp "urges" individuals to use its services, educates users about the use of its services, and maintains and enforces its Terms and other policies relating to the use of its services (Complaint, pars. 43, 45-52, 55-58);
- c. allegations that Yelp's services themselves control Plaintiffs through "motivational awards" that encourage users to keep using Yelp's website (Complaint, pars. 38, 40, 41); and
- d. allegations that the Yelp Elite squad is a form of control because members may receive free promotional items from Yelp, and may lose Elite status if they cease using Yelp's services (Complaint, pars. 39, 53, 54, 57).

a. Yelp's alleged control over "employees"

It is true that Yelp exercises control over its actual employees, i.e., those individuals it hires including software engineers, salespeople, community managers, and accountants. That group does not, however, include Plaintiffs or

1 others like them, who simply use Yelp's website and have never entered into any
 2 employment relationship with Yelp. The barebones allegations that Yelp controls
 3 the work of its actual employees (including their pay and work schedules) does not
 4 plausibly support a conclusion that Yelp therefore must control the Plaintiffs.⁷

5 **b. Yelp allegedly "urges", "encourages" and**
 6 **"educates" its users**

7 The second category of allegations that Yelp encourages the use of its
 8 website, educates users about its website, and manages its website through written
 9 Terms, also do not evidence any control of the employment of Plaintiffs under the
 10 FLSA. For example, the Complaint does not allege that Yelp required Plaintiffs to
 11 use its website at all, much less that Yelp supervised or scheduled the creation of
 12 their content or its posting on Yelp's website, mandated creation of website content
 13 at a certain place or using certain equipment, or otherwise forced Plaintiffs to
 14 submit any website content at all to Yelp, much less any particular content.

15 Instead, the Complaint merely recites that Yelp—consistent with its role as
 16 an online forum—educates its end-users, such as Plaintiffs, about how to use its
 17 websites, "urges" the use of its services, and maintains and enforces its Terms and
 18 other policies once users post content to Yelp's website. For example, the
 19 Complaint vaguely asserts, without factual basis, that Yelp "urges" and "directs"
 20 individuals to write reviews for its website. Complaint, pars. 16-18, 43. Plaintiffs
 21 also allege that Yelp—like any online business—generally encourages consumers
 22 to use its website. Complaint pars. 53, 58. But these allegations of encouragement
 23 do not plausibly translate into any type of actual control of the Plaintiffs, and only
 24 reflect Yelp's own efforts to market its website to consumers like the Plaintiffs.

25 ⁷ Plaintiffs repetitive allegations that Yelp designates "workers" or
 26 "employees" as "'reviewers' or 'Yelpers' or 'independent contractors' or 'interns'
 27 or 'volunteers' or 'contributors'" are irrelevant. Complaint, pars. 6, 9, 65. There is
 28 no allegation that Yelp used terms such as "intern" or "independent contractor" in
 relation to the Plaintiffs, and it did not. Similarly, the fact that Yelp recruits interns
 (who are paid) does not mean that Yelp hired any Plaintiff as an intern—it did not.
 Complaint, par. 62.

1 Similarly, Plaintiffs repeatedly take issue with the fact that Yelp promulgates
 2 Terms and policies relating to online content, and once content is posted to its
 3 website, may enforce those Terms and policies to correct violations (including
 4 account closures and content removal). Complaint, pars. 16, 17, 45-47 (referring to
 5 account closures of Plaintiffs Sayers and Jeung for violations of Yelp's Terms); 43
 6 (asserting that Yelp communicates the appropriate places on its site for different
 7 kinds of content); 48-51, 55-58 (asserting that Yelp maintains and applies Terms
 8 governing use of its site).⁸ But these supposed grievances of Plaintiffs are not the
 9 complaints of employees, but the gripes of end-users of Yelp's free services who
 10 disagree with the way Yelp administers its websites. *E.g.*, Complaint, par. 56 ("I
 11 loved Yelp until I got an email from them saying they have taken off my photos due
 12 to the pictures being my 'personal experience' and that the reason behind taking off
 13 my photos is because it does not 'portray the business as a whole.'") citing Content
 14 Guidelines ("Photo Guidelines"), Aragon Decl., par. 5, Ex. C.

15 Further, Yelp's Terms make clear that Plaintiffs alone owned, and were
 16 ultimately responsible for, the submission of their own content. Terms of Service,
 17 Aragon Decl., par. 4, Ex. B, Section 5(A) ("You alone are responsible for Your
 18 Content, and once published, it cannot always be withdrawn. You assume all risks
 19 associated with Your Content, including anyone's reliance on its quality, accuracy,
 20 or reliability . . . You may not imply that Your Content is in any way sponsored or
 21 endorsed by Yelp."); Section 5(C) ("As between you and Yelp, you own Your
 22 Content."); Section 12(A) ("THE SITE IS MADE AVAILABLE TO YOU ON AN
 23 "AS IS", "WITH ALL FAULTS" AND "AS AVAILABLE" BASIS, WITH THE
 24 EXPRESS UNDERSTANDING THAT THE YELP ENTITIES MAY NOT
 25 MONITOR, CONTROL OR VET USER CONTENT. AS SUCH, YOUR USE OF

26
 27 ⁸ Plaintiffs speculate that Yelp took action on posted content and user accounts to
 28 specifically benefit advertisers. Such allegations are conclusory and incorrect, but
 are also irrelevant and appear intended solely to harm Yelp's reputation.

1 THE SITE IS AT YOUR OWN DISCRETION AND RISK.”). Such disclosures
 2 further demonstrate that while Yelp, of course, has control over its own websites, it
 3 has no control over Plaintiffs’ themselves.

4 **c. Yelp’s alleged “motivational awards”**

5 Plaintiffs’ third category of allegations relate to “motivational rewards”
 6 implicit in Yelp’s website itself, such as publicly noting when a user is the “First to
 7 Review” a particular business, or when a user “checks-in” extensively to a certain
 8 establishment through Yelp’s mobile applications. Complaint, pars. 38, 40-41.
 9 These allegations, however, merely describe Yelp’s website itself and highlight
 10 some features that may drive Yelp’s popularity with the Plaintiffs and users like
 11 them. Such allegations cannot show any plausible form of employer control over
 12 the Plaintiffs any more than the “motivational reward” in getting the high score in a
 13 video game suggests that the game’s manufacturer employs its players.

14 **d. Yelp’s alleged control through the Elite Squad**

15 Plaintiffs’ fourth set of allegations concerning the Yelp Elite squad—Yelp’s
 16 recognition program for certain users—also do not establish any employment
 17 relationship. Complaint, pars. 39, 53-54. The fact that some of the Plaintiffs once
 18 participated in this program, enjoyed the perks of such participation, and continued
 19 using Yelp’s free services in efforts to keep participating, does not create an
 20 employment relationship with Yelp. Indeed, the Yelp Elite program is analogous to
 21 participation in an airline frequent flyer program—simply because the airline urges
 22 such participants to use their services, rewards them for doing so with special
 23 privileges and status (free drink coupons, entry to the airport club, early boarding),
 24 and may remove such status in its own discretion, does not turn the participants into
 25 employees of the airline. Further, the Elite Terms that the Elite program explicitly
 26 state that members of the Elite squad are not employees of Yelp, cutting against any
 27 expectation of an employment relationship. Elite Terms, Aragon Decl., par. 6, Ex.
 28 D, Section 7.

1 **3. Plaintiffs’ Allegations Are Insufficient to Establish**
 2 **That Yelp Determined Rate and Methods of Payment**

3 Yelp did not determine rates or methods of payment to Plaintiffs, as no
 4 payments were made. There is no allegation that Yelp ever offered or promised to
 5 pay any Plaintiff, or that any Plaintiff ever expected to receive any payments from
 6 Yelp for their use of Yelp’s services. While the Complaint references free
 7 promotional items that Yelp distributes in efforts to market its website to users like
 8 the Plaintiffs—actions equal to those taken by virtually any other major service
 9 provider—there is no allegation that these freebies were given in return for any
 10 specific work, or for any other reason than for Yelp to promote itself and its
 11 services to the public. Complaint, par. 38 (describing rewards as “trinkets, badges,
 12 titles, praise, social promotion, free liquor, free food, and free promotional Yelp
 13 attire”).

14 **4. Plaintiffs’ Allegations Are Insufficient to Establish**
 15 **That Yelp Maintained Employment Records**

16 Yelp does not maintain employment records for Plaintiffs because Plaintiffs
 17 were never employees of Yelp. No such employment records are alleged in the
 18 Complaint. The only records alleged in the Complaint are the Terms and related
 19 documents, which starkly contradict any allegation of employment. *See* Frequently
 20 Asked Questions, Aragon Decl., par. 3, Ex. A; Terms, Aragon Decl., par. 4, Exs. B
 21 & C; Elite Terms, Aragon Decl., par. 6, Ex. D. *Strickland*, 87 F.3d at 1067.

22 * * *

23 Under Plaintiffs’ theory of liability, popular websites like Amazon,
 24 Facebook, eBay, Google and Twitter would suddenly gain hundreds of millions of
 25 employees, all entitled to billions of dollars in payment by the mere fact that they
 26 have used these online forums to express themselves through content contributions.
 27 Under this wild theory, anyone can become an employee of a website merely
 28 through the act of posting content to it. This is plainly an absurd argument, and

1 tellingly, Plaintiffs' Complaint lacks allegations sufficient to plausibly show that
 2 Plaintiffs are, or ever were, employees of Yelp, and instead, tend to show that they
 3 were not employees. The Court should dismiss Plaintiffs' claim for FLSA
 4 violations. *See Brouwer v. Metropolitan Dade County*, 139 F.3d 817, 818 (11th
 5 Cir. 1998) (affirming Rule 12(b)(6) dismissal of juror's FLSA claim and finding
 6 that economic reality was that juror was not employee of county).

7 **IV. THE COURT SHOULD STRIKE PURPORTED CLASS** 8 **ACTION ALLEGATIONS UNDER RULE 12(F)**

9 **A. Rule 12(f) Standard**

10 Rule 12(f) allows the court to "strike from a pleading ... any redundant,
 11 immaterial, impertinent, or scandalous matter." *See also Whittlestone, Inc. v.*
 12 *Handi-Craft Co.*, 618 F.3d 970, 973-974 (9th Cir. 2010). Where the complaint
 13 demonstrates that a class action cannot be maintained on the allegations at the
 14 pleading stage, courts have relied on Rule 12(f) to strike class allegations at an early
 15 stage of a lawsuit. *See Lyons v. Bank of Am.*, 2011 WL 6303390, at *7 (N.D. Cal.
 16 Dec. 16, 2011) (citing *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir.
 17 1993), *rev'd on other grounds*, 510 U.S. 517. *See also Stearns v. Select Comfort*
 18 *Retail Corp.*, 2009 WL 4723366, at *15-16 (N.D. Cal. Dec. 4, 2009); *Sanders v.*
 19 *Apple, Inc.*, 672 F. Supp. 2d 978, 990 (N.D. Cal. 2009) (addressing the use of Rule
 20 12(f) and noting that "[w]here the complaint demonstrates that a class action cannot
 21 be maintained on the facts alleged, a defendant may move to strike class allegations
 22 prior to discovery."); *Brazil v. Dell, Inc.*, 585 F. Supp. 2d 1158, 1167 (N.D. Cal.
 23 2008).

24 **B. Plaintiffs Fail to Define any Ascertainable Class**

25 Courts have held that a class must be adequately defined and clearly
 26 ascertainable before a class action may proceed. *Schwartz v. Upper Deck Co.*, 183
 27 F.R.D. 672, 679-680 (S.D. Cal. 1999). *See also Lozano v. AT&T Wireless Servs.,*
 28 *Inc.*, 504 F.3d 718 (9th Cir. 2007). A class definition should be "precise, objective

1 and presently ascertainable.” *O’Connor v. Boeing North American, Inc.*, 184
 2 F.R.D. 311, 319 (C.D. Cal. 1998). “An adequate class definition specifies ‘a
 3 distinct group of plaintiffs whose members [can] be identified with particularity.’”
 4 *Campbell v. PricewaterhouseCoopers, LLP*, 253 F.R.D. 586, 593 (E.D. Cal. 2008)
 5 (quoting *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir.
 6 1978).

7 Plaintiffs fail to meet their burden of defining an ascertainable class in their
 8 Complaint. Instead, Plaintiffs baldly allege that they were “employees of
 9 Defendant, and were not paid wages for their work published on Defendant’s
 10 website; each performed duties relating to the creation and promotion of content on
 11 behalf of Defendant, including but not limited to writing, researching, editing,
 12 lodging reviews, upgrading prior reviews, and generally promoting the site”, and
 13 that the class consists of those who are similarly situated to them. Complaint, par.
 14 22. Such allegations by Plaintiffs are insufficient to objectively identify an
 15 ascertainable class.

16 First, each Plaintiff’s claims depend upon their individual circumstances and
 17 unique interactions with Yelp. *See* Complaint, pars. 15-18. Plaintiffs’ allege—
 18 without factual support—that they had “duties”, but there is enormous variation
 19 among Plaintiffs themselves, and among Plaintiffs and other consumers of Yelp’s
 20 websites regarding at least: each of their respective individualized communications
 21 or interactions with Yelp; each of their individualized content contributions posted
 22 to Yelp (for example whether, and how, Yelp imposed “duties” of content creation
 23 in relation to each particular contribution, and whether each particular contribution
 24 conformed to Yelp’s Terms); and the respective state of mind of each of the
 25 individual users of Yelp’s websites with respect to their relationship with Yelp (for
 26 example, did a Yelp user somehow feel forced to perform “duties” of content
 27 contribution, or did the user simply like to use Yelp’s free website).

28 ///

1 Second, as described above, named Plaintiffs' claims to be "employees" are
 2 implausible legal conclusions. Identifying the class as "employees" necessitates the
 3 question of whether an employer/employee relationship exists under FLSA between
 4 Yelp and each of the tens of millions of rank and file users of Yelp's online
 5 services—relationships that Yelp denies exists and which the allegations of the
 6 Complaint do not support even for the named Plaintiffs. It is impossible to
 7 ascertain which individuals could possibly be included in this putative "class" of
 8 "employees" when there are no uniform facts demonstrating an employee/employer
 9 relationship for each user of Yelp's free websites.

10 Consequently, Plaintiffs' purported class action allegations should be
 11 stricken. This Court should exercise its discretion to strike Plaintiffs' spurious
 12 allegations relating to its proposed unascertainable class. *See Fantasy, Inc.*, 984
 13 F.2d at 1527.

14 **V. CONCLUSION**

15 Based on all of the foregoing, pursuant to Rule 12(b)(6), this Court should
 16 dismiss, with prejudice, Plaintiffs' First Cause of Action for Violation of the FLSA.
 17 In addition, the Court should strike, with prejudice, Plaintiffs' purported class
 18 action allegations pursuant to Rule 12(f).

19
 20 Dated: November 27, 2013

RESPECTFULLY SUBMITTED,

LECLAIRRYAN, LLP

21
 22
 23 By: /s/ Angeli Aragon

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Angeli Aragon

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